

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Stale or Moot Docketed Proceedings	)	
	)	
1993 Annual Access Tariff Filings Phase I	)	CC Docket No. 93-193
	)	
1994 Annual Access Tariff Filings	)	CC Docket No. 94-65
	)	
AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462 and 5464 Phase II	)	CC Docket No. 93-193
	)	
Bell Atlantic Telephone Companies Tariff F.C.C. No.1, Transmittal No. 690	)	CC Docket No. 94-157
	)	
NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328	)	

**REPLY COMMENTS OF SBC COMMUNICATIONS INC.**

SBC Communications, Inc. (SBC), on behalf of Ameritech Illinois d/b/a SBC Illinois, Ameritech Indiana d/b/a SBC Indiana, Ameritech Michigan d/b/a SBC Michigan, Ameritech Ohio d/b/a SBC Ohio, Ameritech Wisconsin d/b/a SBC Wisconsin, Nevada Bell Telephone Company d/b/a SBC Nevada, Pacific Bell Telephone Company d/b/a SBC California, and Southwestern Bell Telephone L.P., SBC Southwest (“SBC LECs”), hereby submits these reply comments in response to comments filed in the above-captioned proceeding.<sup>1</sup> As SBC demonstrates below, AT&T and WorldCom’s arguments lack merit and should be rejected.

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<sup>1</sup> *State or Moot Docketed Proceedings; 1993 Annual Access Tariff Filings Phase I; 1994 Annual Access Tariff Filings*, Docket Nos. 93-193, 94-65, 94-157, *Order, Notice and Erratum*, 18 FCC Rcd 2550 (2003) (*Reinstatement Notice*).

AT&T's and WorldCom's position in this proceeding boils down to one argument: that the Commission must apply its post-1996 rules regarding the treatment of unfunded OPEBs to the 1992-1995 period. They argue that the Commission should rely on its 1997 rule excluding unfunded OPEB liability from the rate base as justification for excluding such costs in earlier years. This is nothing more than retroactive ratemaking, which is strictly prohibited. The fact that the Commission changed its rules in 1997, after conducting a rulemaking proceeding, to exclude unfunded OPEB liability from the rate base demonstrates that unfunded OPEB costs were *not* excluded from the rate base prior to 1996. If there was any doubt, the Commission's order rescinding the Bureau's Responsible Accounting Officer Letter (RAO 20)<sup>2</sup> on the grounds that the Commission's then-current rules did not exclude unfunded OPEB costs from the rate base makes this fact an absolute certainty. What AT&T dismisses as a "loophole" is simply the result of a straightforward application of Commission rules that were modified four years later. AT&T's and WorldCom's arguments that the Commission must give its 1997 rules retroactive effect because they believe the prior rules produce the wrong result would turn the APA on its head.

AT&T and WorldCom argue that the LECs were wrong to recalculate their earnings and sharing obligations in light of the Commission's rescission of *RAO 20*. In this regard, they argue repeatedly that unfunded OPEBs, like unfunded pensions,<sup>3</sup> are zero-cost funds for which the LECs are not entitled to earn a return from ratepayers and thus should not have been included in the rate base.

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<sup>2</sup> *Uniform Accounting for Post Retirement Benefits Other Than Pensions in Part 32*, 7 FCC Rcd 2872 (1992) (*RAO 20*).

<sup>3</sup> AT&T attempts to analogize unfunded OPEBs to unfunded pensions but AT&T has ignored a key difference. Accrual for unfunded pensions was already in place prior to price caps and thus was included in the original price cap rates. It thus made sense for the Commission to require accrued unfunded pensions to be excluded from the rate base. OPEB costs, however, were accounted for on a cash basis at the inception of price caps and consequently "accrued and unfunded" OPEB costs were not reflected in the initial price cap rates. Thus there was no reason to require a reduction in the rate base when FAS 106 was adopted.

AT&T and WorldCom continue to disregard the significance of the Commission's rescission of *RAO 20*. When the Commission rescinded *RAO 20*, it expressly found that the Bureau could not direct the LECs to exclude costs from the rate base that were not specifically identified in Section 65.830 of the Commission's rules.<sup>4</sup> Unfunded OPEBs were not specifically included in Section 65.830, thus according to the *Commission's* interpretation of its rules, the LECs could not exclude unfunded OPEBs from their rate base.<sup>5</sup> This, in effect, meant that the LECs' prior exclusion of unfunded OPEBs from their rate base was inconsistent with the Commission's Part 65 rules. Consequently, not only did the LECs act appropriately to recalculate their prior earnings and sharing obligations, they were required to do so.

Moreover, AT&T and WorldCom completely ignore the fact that the Commission subsequently issued a notice of proposed rulemaking (NPRM) to amend its rules to require the exclusion of unfunded OPEBs from the rate base. Had the Commission considered its then-existing rules sufficient to require the LECs to exclude unfunded OPEBs from their rate base, the Commission would not have rescinded *RAO 20*, much less issued a NPRM. Rather, the Commission would have merely clarified its rules. But, as the Commission concluded in the *RAO 20 Rescission Order*, modification of its existing Part 65 rules was necessary to require LECs to exclude unfunded OPEBs from their rate base and the Commission ultimately amended its rules in 1997 to require such exclusions *prospectively*.<sup>7</sup>

The key here is that a rule change was necessary. AT&T and WorldCom are wrong that the Commission could impose its 1997 rules retroactively and require the LECs to exclude

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<sup>4</sup> *Responsible Accounting Officer Letter 20, Uniform Accounting for Post Retirement Benefits Other Than Pensions in Part 32 Amendments to Part 65, Interstate Rate of Return Prescription Procedures and Methodologies, Subpart G, Rate Base*, CC Docket No. 96-22; AAD 92-65, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 11 FCC Rcd 2957 (1996) (*Rescission Order*).

<sup>5</sup> *Id.*

<sup>7</sup> *Responsible Accounting Officer Letter 20, Report and Order*, 12 FCC Rcd 2321 (1997).

unfunded OPEB liability from their rate bases for earlier periods. Such action would constitute retroactive ratemaking, which is clearly impermissible under the Act, and further would run afoul of the APA. Consequently, because the rules in 1996 did not permit LECs to exclude OPEBs from their rate base, as confirmed by the *RAO 20 Rescission Order* and NPRM, the LECs had every right to, and indeed were obligated to, revise their prior earnings and sharing calculations to reverse the Bureau's incorrect interpretation of the Commission's rules.

AT&T further argues that even if the LECs could add back the excluded unfunded OPEBs in light of the *RAO 20 Rescission Order* — which they most certainly could — the LECs' were procedurally barred from restating their rates of return and sharing obligations. Specifically, AT&T contends that these adjustments are exogenous cost adjustments to their PCIs and the LECs did not seek the necessary waiver from the Commission to effect such changes.

As a threshold matter, AT&T's highly selective demand for strict compliance with procedural requirements is laughable. In every other instance, AT&T is asking the Commission to flagrantly disregard its rules and procedures. It is demanding that the Commission retroactively apply its post-1996 rules excluding OPEB costs from the rate base. It is demanding that the Commission grant its request for relief, even though AT&T failed to file a timely petition for reconsideration or appeal of *RAO 20*. It is demanding that the Commission issue an order in a tariff investigation that has exceeded the statutory five-month period by more than seven years. And it is demanding that the Commission revive a proceeding that was terminated more than a year ago. If AT&T has its way in this proceeding, the Commission's rules will be completely thrown out the window.

In any event, AT&T's procedural argument is misplaced. Contrary to AT&T's characterization, this proceeding is not about a permanent exogenous adjustment for OPEB-related accounting changes.<sup>8</sup> The LECs' 1996 filings simply reversed a portion of the temporary

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<sup>8</sup> SBC acknowledges that under the Commission's post-1995 rules, OPEB-related accounting changes do not qualify for such exogenous relief.

exogenous adjustments that had been mistakenly triggered in 1992-1995 pursuant to Section 61.45(d)(2). AT&T would have the Commission ignore the impact of the *RAO 20* rescission, but the fact is the rescission meant that the LECs, in prior years, should have included unfunded OPEBs in their rate bases, which in turn would have lowered their rates of return and sharing obligations. The LECs merely corrected errors to their earnings and sharing calculations — errors due *wholly* to the Bureau's faulty interpretation of the Commission's Part 65 rules. Nothing in the Commission's rules prohibited carriers from revising their earnings and sharing calculations to correct such errors. Accordingly, AT&T is wrong that a waiver was required.

AT&T further argues that the Commission's rules precluded carriers from restating their earnings more than 15 months after the close of a base period. This claim is likewise meritless and should be dismissed outright. Section 65.600(d) simply requires carriers to file a report within 15 months after the calendar year reflecting any corrections or modifications to the report. Nothing in Section 65.600(d) expressly prohibited carriers from filing subsequent reports to the extent additional corrections were made, and none should be inferred.

In addition to raising frivolous procedural arguments, AT&T argues that the LECs have failed to meet their burden of proof to show that their adjustments to the rate base and sharing and PCI calculations were correct. First, AT&T argues that the LECs failed to demonstrate whether they removed any prepaid OPEBs from Account 1410 in light of the *RAO 20 Rescission Order*. AT&T obviously misunderstands the accounting method under FAS 106. Pursuant to FAS 106, there could only be a balance in the unfunded OPEB account (Account 4310) or the prepaid OPEB account (Account 1410), not both.<sup>9</sup> For the SBC LECs, there was a balance in the

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<sup>9</sup> If the cumulative accrued FAS 106 expense is greater than the cumulative cash payments (including contributions to OPEB trust funds), then there will be a balance in the unfunded OPEB liability (account 4310) but no balance in the prepaid OPEB asset (account 1410). If, on the other hand, the cumulative accrued FAS 106 expense is less than the cumulative cash payments (including contributions to OPEB trust funds), then there will be a balance in the prepaid OPEB asset (account 1410) but no balance in the unfunded OPEB liability (account 4310).

unfunded OPEB liability account, which was excluded from the rate base due to *RAO 20*. When *RAO 20* was rescinded, this amount was added back into the rate base.

Second, AT&T argues that: (i) the LECs' cost data was inadequate to support their adjustments, (ii) that the data failed to show how their rate base adjustments affected other indices, such as EUCL and CCL charges, and (iii) that, with respect to Ameritech, the data failed to show whether Ameritech added back more to its rate base than it originally included as a reduction in light of *RAO 20*. These arguments have already been addressed in SBC's opening comments. As previously stated, SBC identified the relevant cost data detailing the adjustments made by the SBC LECs, which is more than sufficient to enable the Commission and interested parties to evaluate the reasonableness of the adjustments.<sup>10</sup> SBC also demonstrated that its EUCL and CCL rates for the periods in question were established in a manner fully consistent with the Commission's rules.<sup>11</sup> Further, SBC demonstrated that AT&T's analysis of Ameritech's OPEB liability account was erroneous because AT&T mistakenly considered only one year's worth of OPEB liability expense, when it should have factored in all of Ameritech's OPEB liability since 1991.<sup>12</sup> SBC will not belabor these issues here.

Finally, AT&T's estimation of the SBC LECs' reduction in sharing due to the *RAO 20* rescission is erroneous. Specifically, AT&T has overstated the 1994 reduction in sharing for all the SBC LECs, except Pacific Bell, and the 1995 reduction for all the SBC LECs. Attached as Exhibit One is a correct summary of the SBC LECs' reduction in sharing for the 1992-1995 periods. These figures were taken directly from the cost support data previously provided in conjunction with the SBC LECs' 1996 tariff filings.

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<sup>10</sup> SBC Comments at 12.

<sup>11</sup> SBC Comments at 14.

<sup>12</sup> SBC Comments at 12-14.

## CONCLUSION

For the foregoing reasons, there is no basis for continued investigation into the lawfulness of the SBC LECs' 1996 tariffs.

Respectfully Submitted,

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April 22, 2003

# EXHIBIT ONE



**Summary of 1996 Tariff Adjustments for True-up of Prior Sharing Calculations due to Recission of RAO 20**

	<u>Ameritech</u>	<u>Pacific</u>	<u>SWBT</u>	<u>Nevada</u>	<u>Total</u>
Recalculation of 1992 Sharing	\$ 4.123	\$ -	\$ -	\$ -	\$ 4.123
Recalculation of 1993 Sharing	\$ 10.220	\$ 7.143	\$ 3.612	\$ -	\$ 20.975
Recalculation of 1994 Sharing	\$ 14.165	\$ 8.302	\$ 11.842	\$ 0.498	\$ 34.807
Sub-total	\$ 28.508	\$ 15.445	\$ 15.454	\$ 0.498	\$ 59.905
Including effect of RAO 20 in 1995 Sharing Calculation	\$ -	\$ 4.440	\$ 9.223	N/A***	\$ 13.663
	\$ 28.508	\$ 19.885	\$ 24.677	\$ 0.498	\$ 73.568

**Notes**

- The 1992 - 1994 data was obtained from supporting workpapers filed with the 1996 Tariff filings.
- The 1995 amount for Pacific was obtained from the comments filed in reply to AT&T's petition challenging the 1996 tariffs.
- The 1995 amount for Ameritech is zero because it was not subject to sharing in 1995 (due to its election of the highest productivity factor. As a result, RAO 20 had not impact on the 1995 Ameritech sharing calculation.)

\*\*\* There was no mention of the 1995 impacts for Nevada in the tariff filing or reply comments and SBC has been unable to locate supporting workpapers quantifying those amounts.

CERTIFICATE OF SERVICE

I, Lacreteria Hill, do hereby certify that on this 22<sup>nd</sup> day of April a copy of the foregoing  
“Reply Comments” was served U.S. First Class Postage Paid to the parties listed below.

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